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SURESH EMMANUEL ABISHEGAM & ANOR

v.

RHB BANK BHD

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: W-02-1057-2005]

C

4 AUGUST 2009

LAND LAW: *Charge - Order for sale - Appeal against - Whether there was cause to the contrary - Failure to meet condition precedent for the making of an application for an order for sale - Whether order for sale ought not to have been granted - National Land Code, ss. 256, 257 & 271 - Rules of the High Court 1980, O. 83 r. 3(3) - Low Lee Lian v. Ban Hin Lee Bank*

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This was an appeal by the defendants against the decision of the learned Judicial Commissioner of the High Court granting the plaintiff an order for sale of a property under ss. 256, 257 and 271 of the National Land Code. The property was charged to the plaintiff by the defendants to obtain a housing loan. The defendants defaulted on the repayment of the loan. Consequently, the plaintiff served on the defendants a notice of demand followed by the issuance of Form 16D and upon their failure to comply, commenced the action for an order for sale under s. 256 of the National Land Code. At the hearing before the High Court, there was a reduction of the rate of interest. The plaintiff was unable to produce the written notice of variation of interest rate that it imposed on the defendants. The written notice was a term under cl. 4 of the loan agreement under which the plaintiff was bound to provide. The learned judicial commissioner of the High Court found the omission by the plaintiff to comply with cl. 4 had not in any way prejudiced the defendants as in the ordinary course of business the defendant would have had notice of such a change from the monthly statements of account that the plaintiff sent to the defendants. She allowed the plaintiff's application and granted the order for sale. In the appeal herein, the defendants confined their submission to only the issue whether the learned trial judge was right in not finding a cause to the contrary not to grant the order for sale on account of the failure of the plaintiff to serve such a written notice.

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Held (allowing the appeal with costs)
Per Kang Hwee Gee JCA delivering the judgment of the court:

(1) A failure on the part of the plaintiff to state correctly the interest charged in its supporting affidavit in accordance with the term of the loan agreement under the circumstances was a failure to meet the condition precedent for the making of an application for an order for sale (*Low Lee Lian*). An order for sale ought not to have been granted. (para 12)

Obiter:

(1) Where an order for sale was refused only on the ground that a condition precedent to O. 83 r. 3(3) of the Rules of the High Court 1980 was not met, the application could not be treated as being heard on the merit; and as such it was open to the chargee to begin the originating summons anew to be supported by a proper affidavit alluding correctly to the particulars required under O. 83 r. 3(3). (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh defendan-defendan terhadap keputusan Pesuruhjaya Kehakiman Mahkamah Tinggi yang membenarkan plaintif perintah jualan satu hartanah di bawah ss. 256, 257 dan 271 Kanun Tanah Negara. Hartanah tersebut telah digadai ke plaintiff oleh defendan-defendan untuk mendapatkan pinjaman perumahan. Defendan-defendan gagal membayar balik hutang. Oleh yang demikian, plaintif menyampaikan notis tuntutan diikuti oleh pengeluaran Form 16D dan apabila mereka gagal mematuhinya, memulakan tindakan memohon perintah jualan di bawah s. 256 Kanun Tanah Negara. Semasa pendengaran kes di Mahkamah Tinggi, terdapat pengurangan kadar faedah. Plaintif tidak dapat mengemukakan notis bertulis pengubahan kadar tersebut yang telah dikenakan ke atas defendan-defendan. Notis bertulis adalah syarat di bawah kl. 4 perjanjian pinjaman di mana plaintif wajib memberinya. Pesuruhjaya Kehakiman Mahkamah Tinggi yang bijaksana mendapati peninggalan yang dibuat oleh plaintif untuk memenuhi kl. 4 tidak memprejudiskan defendan-defendan kerana di dalam perjalanan biasa urusan defendan akan memperolehi notis mengenai pengubahan itu dari penyata-penyata akaun bulanan yang plaintif hantar ke defendan-defendan. Pesuruhjaya Kehakiman Mahkamah Tinggi telah membenarkan permohonan plaintif untuk perintah jualan. Di dalam rayuan ini, defendan-defendan hanya berhujah mengenai isu sama

ada hakim bicara betul apabila memutuskan bahawa tidak terdapatnya kausa sebaliknya untuk tidak membenarkan perintah jualan atas sebab kegagalan plaintif mengemukakan notis bertulis tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

(1) Kegagalan pihak plaintif untuk menyatakan dengan betul faedah yang dikenakan di dalam afidavit sokongan plaintif yang diwajibkan di bawah terma-terma perjanjian pinjaman di dalam keadaan tersebut adalah kegagalan memenuhi syarat duluan untuk membuat permohonan perintah jualan (*Low Lee Lian*). Perintah jualan tidak sepatutnya dibenarkan.

Obiter:

(1) Di mana perintah jualan tidak dibenarkan hanya atas sebab syarat duluan A. 83 k. 3(3) Kaedah-kaedah Mahkamah Tinggi 1980 tidak dipenuhi, permohonan tidak boleh dianggap sebagai didengar atas merit; dan ia terbuka ke pemegang gadaian untuk memulakan saman pemula yang baru dan disokong oleh afidavit yang betul dan merujuk kepada butir-butir yang diperlukan di bawah A. 83 k. 3(3).

Case(s) referred to:
Low Lee Lian v. Ban Hin Lee Bank [1997] 2 CLJ 36 SC ***(refd)***
Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

Legislation referred to:
National Land Code, ss. 256(3), 257, 271
Rules of the Court of Appeal 1994, r. 7(3A)
Rules of the High Court 1980, O. 83 rr. 3(3), (6)

For the appellants - Felix Dorairaj; M/s Dorairaj, Low & Teh
For the respondent - Annou Xavier (Lee Swee Seng & Teo Lee Wei with him); M/s Lee Swee Seng & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S4-24-2369-2004]

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee JCA:

[1] This is an appeal by the defendants against the decision of the learned judicial commissioner of the High Court Kuala Lumpur granting the plaintiff an order for sale of a property Hakmilik Strata PN6201 M11/5/5 Mukim Setapak Wilayah Persekutuan under ss. 256, 257 and 271 of the National Land Code 1965. The property was charged to the plaintiff by the defendants to obtain a housing loan for the principal sum of RM51,000 at an interest rate of 10.25% per annum on yearly rests. Under cl. 4 of the loan agreement annexed to the charge, the rate of interest charged may be varied but the plaintiff is required to give the defendants a notice of such variation in writing.

[2] The defendants defaulted on the repayment of the loan. Consequently, the plaintiff served on the defendants a notice of demand on 5 April 2004 followed later by the issuance of Form 16D and upon their failure to comply, commenced the present action for an order for sale under s. 256 of the National Land Code before the High Court.

[3] It was common ground at the hearing before the High Court that there was a reduction of the rate of interest from 10.25% to 9.50% at a certain period of currency of the loan. But the plaintiff was unable to produce the written notice of variation of interest rate that it imposed on the defendants although this was raised as an issue in para 14 of the affidavit in reply of the defendants dated 24 March 2005. The written notice is a term under cl. 4 of the loan agreement under which the plaintiff was bound to provide. It may be noteworthy for future guidance to mention here that in blatant contravention of the rule in *Ladd v. Marshall* and r. 7(3A) of the Rules of the Court of Appeal 1994 the plaintiff only attempted to introduce without leave of the court through an affidavit in this appeal that it had subsequently discovered that such notices of variation had indeed been served on the defendants, an excuse which we must at once reject.

[4] Now, cl. 4 of the loan agreement which states:

> Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the Lender shall be entitled at any time and from time to time to vary at its discretion such rate of interest by

A serving a notice in writing on the Chargor(s) of such its intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

B **[5]** The learned judicial commissioner of the High Court found the omission by the plaintiff to comply with cl. 4 had not in any way prejudiced the defendants as in the ordinary course of business the defendants would have had notice of such a change from the monthly statements of account that the plaintiff sent to the C defendants. She allowed the plaintiff's application and granted the order for sale.

[6] In the appeal before us the defendants confined their submission to only the issue whether the learned trial judge was D right in not finding a cause to the contrary not to grant the order for sale on account of the failure of the plaintiff to serve such a written notice.

[7] The law is now well settled. To successfully resist an action E for an order for sale under s. 256 of the National Land Code it is incumbent upon the chargor to satisfy the court that there is cause to the contrary to refuse an order for sale. The scope within which the court may find cause to the contrary to refuse an order for sale is now defined in the Supreme Court case of *Low Lee Lian v. Ban* F *Hin Lee Bank* [1997] 2 CLJ 36 and the many cases that followed it where "cause to the contrary" in s. 256(3) of the National Land Code was narrowed down to three categories:

(i) where the chargor is able to successfully impeach the chargee's title to the charge to any of the grounds provided in s. 340 of G the Code;

(ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale;

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(iii) where to grant an order for sale would contravene some rule of law or equity.

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[8] Before us the defendants contend that cl. 4 requires a substantive notice to be served and that for the purpose of cl. 4 it could not be presumed that such a notice had been issued in its ordinary course of business as the learned judge had done. A failure on the part of the plaintiff to serve the notice, it is submitted, constitutes a non-compliance of O. 83 r. 3(3) read with r. 3(6) of the Rules of the High Court 1980 which should result in the dismissal of the plaintiff's application.

Rule 3(3) provides that:

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
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> (d) the amount remaining due under the charge.

And r. 3(6) provides that:

> Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

[9] The defendants relied on the Court of Appeal decision in *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791, a case where the supporting affidavit of the chargee bank failed to state the base lending rate (BLR) it imposed on the defendant. It was held that the court was in no position to take judicial notice of the BLR charged by the bank as different banks had different BLR and that a failure on the part of the bank to state the BLR applicable at the time when the charge instrument was executed had left the borrower in the dark as to the actual interest rate charged. It held that the omission did not comply with O. 83 r. 3(3) of the Rules of the High Court 1980 and this was fatal to an application for an order for sale.

[10] A close examination of the supporting affidavit dated 25 October 2004 and the subsequent affidavit in reply dated 11 May 2005 of the Assistant General Manager of the plaintiff Choo Chooi Yan however, discloses a more serious irregularity in the plaintiff's application than the mere failure of issuing the notice of variation. The Notice of Recall of Housing Loan dated 5 April 2004 and the subsequent statutory notice Form 16D stated that the interest due on the loan was based on the BLR (Base Lending Rate) of 6% + 3.5% per annum contrary to the loan agreement which provides the interest chargeable was based on the flat rate of 10.25% per annum. The agreement it is clear does not make BLR as the base from which the rate of interest is to be added to, subtracted from or varied as is commonly found in loan agreements of financial institutions.

[11] It follows therefore, claiming interest due based on the BLR of 6% + 3.5% per annum contrary to the terms of the loan agreement constitutes an incorrect and unlawful claim and could not under the circumstances constitute a valid statement of the amount of interest legally due and owing as at the date the original summons was filed as required under O. 83 r. 3(3).

[12] We are unanimous in our view that a failure on the part of the plaintiff to state correctly the interest charged in its supporting affidavit in accordance with the term of the loan agreement under the circumstances is a failure to meet the condition precedent for the making of an application for an order for sale under category (ii) of *Low Lee Lian* that an order for sale ought not to have been granted. Had a valid certificate been provided under the rule in *Citibank NA* or *Chempaka Finance* the question whether the requisite notice of the change in interest rate would be insignificant. There would be little in the way that the order for sale could be resisted.

[13] Given the unsatisfactory manner in which the application was presented at the High Court we are constrained to allow the appeal with costs.

[14] We must however add a rider to remind the parties that where an order for sale is refused only on the ground that a condition precedent to O. 83 r. 3(3) of the Rules of the High Court 1980 is not met, the application cannot be treated as being heard on the merit; and as such it is open to the chargee to begin the

originating summons anew to be supported by a proper affidavit alluding correctly to the particulars required under O. 83 r. 3(3). As Gopal Sri Ram JCA was minded to say of category (ii) in *Low Lee Lian* above:

> However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.